NO. 17

IN THE

Supreme Court of the United States

October Term, 1968

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES D. KNOX, *Appellee*

On Appeal from the United States District Court for the Western District of Texas

MOTION TO DISMISS OR AFFIRM

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LIST OF AUTHORITIES

NO. 675

IN THE

Supreme Court of the United States

October Term, 1968

UNITED STATES OF AMERICA, *Appellant*

v.

JAMES D. KNOX, *Appellee*

MOTION TO DISMISS OR AFFIRM

The Appellee, James D. Knox, pursuant to Rule 16, Paragraph 1(c) and (d) moves that the appeal be dismissed or alternatively that the judgment of the District Court be affirmed.

QUESTIONS PRESENTED

I. Whether a false statement prosecution under 18 U. S. C. A. 1001 can be maintained on allegations of failure to answer questions 5(b) and 5(c) of Internal Revenue Service Form 11-C?

II. Whether under *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, Appellee could refuse to

answer questions 5(b) and 5(c) submitted in Internal Revenue Service Form 11-C, when affirmative answers to these questions would have incriminated him under penal statutes imposing greater penalties than those under which he incriminated himself when he answered the other questions?

STATEMENT

The Government bases its appeal solely on Counts Five and Six of the Indictment. The graveman of each charge is that Appellee failed to answer certain questions in Internal Revenue Service Form 11-C[1] Examination of this form in relation to Counts Five and Six discloses that the questions the Government charges were not answered are Nos. 5(b) and 5(c) of said form.

ARGUMENT

I.

Neither Count Five nor Count Six of the indictment charges an affirmative false statement; they charge only failures to answer questions 5(b) and 5(c) of Internal Revenue Service Form 11-C. It seems fundamental that failure to answer a question or to make a statement can not be a false statement. Consequently, the counts do not charge false and fraudulent statements under 18 U.S.C.A. 1001. Counsel's research has produced no Federal decisions directly on the point but state court precedents hold that charges of perjury or false statements can not be grounded on failure to make statements,

1. Photocopy of Internal Revenue Form 11-C is reproduced as Appendix A, P. 7.

no matter how material the statements, if made, may have been. *People v. French* (Calif. 1933), 26 Pac. 2d 310; *People v. Dodge* (N. Y. 1961), 12 A.D.2d 353, 212 New York Supp. 2d 526.

The State in *People v. French,* supra, charged that the defendant filed an application to Los Angeles County for poor person relief without including with the application a list of properties in which he claimed a legal or equitable interest: ". . . And the Defendant in said affidavit did willfully and intentionally fail to state the nature, location and value of all property in which he, the said Defendant, had any interest."

It was the State's contention that the failure to furnish this information, which was required by the poor relief ordinance, constituted false statements or perjury. However, the Court affirmed a dismissal of the indictment on the fundamental premise that a failure to make a statement can not be a perjurious false statement:

> "It would seem so clear that discussion should be unnecessary either to illustrate or to establish the point that a criminal action against a defendant for the commission by him of the crime of perjury cannot be maintained on an allegation that in making an affidavit he failed to make a statement of any fact, however relevant or material such fact, if made, might be to the subject-matter in hand, or however mandatory the rule might be by which he was directed or required to make such statement as a prerequisite to the accomplishment of the object of the affidavit."

In *People v. Dodge,* supra, it was argued by the prosecution that certain petitions to a City Council should be

construed to contain false staetments, because the Ordinance under which the petition was filed required allegations of certain facts which were not stated in the petition. The Court rejected the contention, holding that charges of perjury or false statements can not be based on failures to make statements:

> "It has been argued that the petitions should be read as containing the false statements alleged to have been made because the ordinance required proof of such facts as a prerequisite to the grant of relief, and the petitions were presented pursuant to the ordinance. As we have stated, the ordinance did not require proof; but even if it did, a failure to make the statements alleged to have been made would not have constituted perjury. Perjury is not committed by failing to make a statement of a fact, no matter how relevant or material such statement, if made, might be to the subject matter in hand, and no matter how mandatory the rule might be requiring such statement to be made as a prerequisite to the accomplishment of the purpose of an affidavit."

To construe 18 U.S.C.A. 1001 as contended for by the Government would result in the flagrant injustices of subjecting every citizen to a criminal prosecution whenever he failed to answer a question or fill out a blank in any of the myriad forms daily submitted by the thousands to the innumerable Governmental agencies and bureaus. It is urged such was not the intent of Congress in enacting §1001, that it did not intend to abrogate the age-old concepts of perjury or false statements and to subject a citizen to five years in prison and a $1,000.00 fine for failure to fill out all the blanks in an agency form.

Analogous unintended results have been avoided by the lower courts in construing §1001. It does not penalize statements as to what might be in the future; the truth or falsity of such are incapable of proof as of the time the statements are made. *Kolaski v. United States* (5th Cir.), 362 F.2d 847. Mere negative, oral answers to questions propounded by Federal investigators are not "statements" within the meaning of §1001. *Paternostro v. United States* (5th Cir.), 311 F.2d 298; *United States v. Stark* (D.C. Md.), 131 F. Supp. 88; *United States v. Levin* (D. C. Col.), 133 F. Supp. 88.

II.

Under his Fifth Amendment immunity Knox could have refused to answer any of the questions submitted in Internal Revenue Service Form 11-C. *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709; *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697. Though he waived this immunity as to those questions answered, it is a proper extension of *Grosso* and *Marchetti* that he could nevertheless claim his immunity to the questions not answered if to answer them would incriminate him as to other and more onerous penal statutes.

By answering the questions other than 5(b) and 5(c), Knox incriminated himself under the *Texas Bookmaking Statute, Texas Penal Code,* Art. 652(a), §1, which allows a minimum penalty of only ten days in jail and a $100.00 fine.[2] However, had he answered questions 5(b) and 5(c) and had such answers disclosed the names of persons assisting him in bookmaking he would have in-

2. This statute is quoted in Appendix B, P. 8.

criminated himself under the Texas *Conspiracy Statutes, Texas Penal Code,* Arts. 1622-1629, which provide for a minimum penalty of two years in the state penitentiary.[3] It is respectfully urged that the Fifth Amendment protects his avoiding incriminating himself under these more onerous provisions of the *Texas Penal Code.*

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the United States District Court for the Western District of Texas should be affirmed, or that the appeal should be dismissed.

Respectfully submitted,

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3. The materal portions of these statutes are quoted in Appendix C, P. 9.

APPENDIX A

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from _____ (Month, day, and year) to June 30, 19____

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

For District Director's Use Only

_____ (Stamp number)

_____ (Date issued)

_____ (Registration number)

Tax..... $_____

Penalty..... $_____

Interest..... $_____

Total..... $

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

1. Name: True name _____

Alias, style, or trade name, if any _____

2. Address: Residence _____ (Number and street)

_____ (City) _____ (County) _____ (State)

Business _____ (Number and street)

_____ (City) _____ (County) _____ (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

_____

_____

_____

_____

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name or location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf _____

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. to present use	Street address	City and State

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

_____, 19____ _____ _____

(Date) (Signature) (State whether individual owner, member of firm, or if corporation officer, give title)

APPENDIX B

TEXAS PENAL CODE

Art. 652a. *Bookmaking; definition; penalty*

Accepting or placing wagers; punishment

Section 1. Any person who takes or accepts or places for another a bet or wager of money or anything of value on a horse race, dog race, automobile race, motorcycle race or any other race of any kind whatsoever, football game, baseball game, athletic contest or sports event of whatsoever kind or character; or any person who offers to take or accept or place for another any such bet or wager; or any person who as an agent, servant or employee or otherwise, aids or encourages another to take or accept or place any such bet or wager; or any person who directly or indirectly authorizes aids or encourages any agent, servant or employee or other person to take or accept or place or transmit any such bet or wager shall be guilty of book making and upon conviction be punished by confinement in the State Penitentiary for any term of years not less than one (1) nor more than five (5) or by confinement in the county jail for not less than ten (10) days nor more than one (1) year and by a fine of not less than One Hundred ($100.00) Dollars nor more than One Thousand ($1,000.00) Dollars.

APPENDIX C

TEXAS PENAL CODE

CONSPIRACY

Art. 1622. [1433-1437] Definition

A conspiracy is an agreement entered into between two or more persons to commit a felony.

Art. 1623. [1434] [954] [801] When Conspiracy Complete

The offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined.

Art. 1626. [1438] [958] [805] Punishment for Conspiracy

Conspiracy to commit murder shall be punished by confinement in the penitentiary not less than two nor more than ten years. Conspiracy to commit any other felony shall be punished by confinement in the penitentiary not less than two nor more than five years.